

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

DAVID GRIMMETT,	)	
	)	
Plaintiff,	)	
	)	No. CV-10-241-HU
v.	)	
	)	
KNIFE RIVER CORPORATION -	)	
NORTHWEST, an Oregon	)	
corporation, dba KNIFE RIVER	)	OPINION & ORDER
an MDU RESOURCES COMPANY,	)	
	)	
Defendant.	)	
_____	)	

Kevin T. Lafky  
Haley Percell  
LAFKY & LAFKY  
429 Court Street NE  
Salem, Oregon 97301

Attorneys for Plaintiff

Jens Schmidt  
Kate G. Watkinson  
HARRANG LONG GARY RUDNICK, P.C.  
360 East 10th Avenue, Suite 300  
Eugene, Oregon 97401-3273

Attorneys for Defendant

/ / /

/ / /

1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff David Grimmatt brings this employment discrimination  
3 case against his former employer defendant Knife River Corporation.  
4 Specifically, plaintiff brings a race discrimination claim under 42  
5 U.S.C. § 1981, and a supplemental state claim for intentional  
6 infliction of emotional distress (IIED).

7 Defendant moves for summary judgment on both of plaintiff's  
8 claims. Both parties have consented to entry of final judgment by  
9 a Magistrate Judge in accordance with Federal Rule of Civil  
10 Procedure 73 and 28 U.S.C. § 636(c). I grant the motion in part  
11 and deny it in part.

12 BACKGROUND

13 Defendant Knife River Corporation is in the construction  
14 business and operates from multiple locations in Oregon providing  
15 aggregate, asphalt, building materials, construction services, and  
16 ready mix concrete for customers in both the public and private  
17 sectors.

18 Plaintiff is African-American and began working for defendant  
19 in July 2005 as a general laborer on a paving crew out of  
20 defendant's Coffee Lake location, south of Portland. Because the  
21 job was too physically demanding, plaintiff requested and received  
22 a transfer to defendant's Waterview Sand & Gravel location. He was  
23 a groundsman, with his primary duties keeping the machinery and  
24 equipment at the site clean. He also drove a haul truck.  
25 Typically, there were eight to ten employees on site during his  
26 shift. All but one of the other employees were Caucasian,  
27 including Jeremy Russell, plaintiff's supervisor, and Dennis  
28 Druery, the site superintendent.

1 I. Incidents at Waterview

2 Plaintiff worked at Waterview from August 14, 2005, until  
3 December 2006. During that time, he worked with a Caucasian  
4 employee named Steve Wetten. Wetten used the term "nigger" around  
5 plaintiff, stating it a little less frequently than every week.  
6 Pltf Depo. at pp. 43-44. Wetten admits he used the word "nigger"  
7 around plaintiff in the workplace. Wetten Depo. at pp. 10, 17.  
8 Plaintiff explained that Wetten used the term "nigger this" or  
9 "nigger that" and at times he would apologize, but then the next  
10 week he would say the same thing again. Id. at p. 43-45. Wetten  
11 referred to rocks in the pit or the road as "little nigger heads."  
12 Id. at p. 44; see also Wetten Depo. at pp. 10-11 (used term "nigger  
13 heads" when referring to big rocks within a roadbed, "explaining"  
14 that this is a term used for over 100 years by road builders).

15 Separately, Wetten referred to malfunctioning equipment as  
16 "nigger-rigged" and "African ingenuity." Wetten Depo. at p. 17.  
17 When he first used the term "nigger-rigged," plaintiff complained  
18 to Wetten about it, and according to Wetten, two or three weeks  
19 later, Wetten used the term "African ingenuity." Id. at pp. 17-18;  
20 see also Druery Depo. at p. 14 (heard Wetten use term "African  
21 ingenuity" the day after hearing him use term "nigger-rigged").

22 On a separate occasion, plaintiff heard a different Caucasian  
23 employee at Waterview, Wes Henshaw, state over the radio that  
24 "Dave's black ass is going to work today." Pltf Depo. at p. 47.  
25 Plaintiff states that he confronted Henshaw about it. Id. Wetten  
26 testified that Henshaw used the word nigger around plaintiff.  
27 Wetten Depo. at pp. 11-12.

28 Plaintiff states that Wetten's references to "nigger" went on

1 for about a year, and at some unspecified point, plaintiff reported  
2 Wetten's frequent use of the word "nigger" to Russell, his  
3 supervisor, and site superintendent Druery. Pltf Depo. at pp. 43-  
4 44. Plaintiff testified that Druery and Russell themselves  
5 overheard Wetten's use of the word and to plaintiff's knowledge,  
6 they never did anything about it and Wetten received no discipline.  
7 Id. at pp. 43-44.

8 Druery states he was present when Wetten used the term  
9 "nigger-rigged" to describe how Wetten had repaired or rigged a  
10 piece of equipment. Druery Depo. at p. 12. Plaintiff was also  
11 present. Id. According to Druery, as soon as Wetten used the  
12 term, Druery "instantly" looked at plaintiff, plaintiff was looking  
13 at Druery, and Druery told Wetten "outside." Id. Wetten went  
14 outside where Druery said, "bluntly, . . . make no mistakes about  
15 it, that if I ever heard him say anything like that again, that he  
16 would just be gone." Id. at pp. 12-13. Druery testified that  
17 plaintiff had not complained to him about Wetten before this  
18 incident and did not complain after the incident. Id. at p. 13.  
19 Plaintiff did not complain to Druery about other employees making  
20 racial slurs. Id. at p. 14. Druery also stated that Russell never  
21 told Druery that plaintiff had complained to him about Wetten  
22 making racial slurs. Id. at p. 13.

23 According to Druery, the very next day after telling Wetten he  
24 would be gone if he said anything like that again, Wetten used the  
25 term "African ingenuity." Id. at p. 14. Although there were other  
26 people present, Druery could not remember one way or the other  
27 whether plaintiff was one of them. Id. Druery does not recall  
28 saying anything to Wetten because he did not think he had to. He

1 states: "I don't even think I had to say anything. I just looked  
2 at him and I was like, seriously. . . . I might have told him to  
3 shut up or something. I don't know." Id. at p. 15. There is no  
4 written documentation about the incident. Id.

5 Plaintiff worked at Waterview until he went on medical leave  
6 in December 2006. He returned to work in February 2007 and was  
7 assigned work as a loader operator at defendant's Linnton ready mix  
8 site.

9 II. Incidents at Linnton

10 The crew at Linnton consisted of six or seven other employees  
11 during plaintiff's shift, including one African-American<sup>1</sup>, one  
12 Hispanic, and at least one woman. When plaintiff first started  
13 there, the site superintendent was Jim Dumolt. Dumolt retired in  
14 the spring of 2007 and was replaced by Kermit Achenbach who became  
15 plaintiff's immediate supervisor.

16 According to plaintiff, on or about May 18, 2007, Achenbach  
17 had asked plaintiff to use the loader to put up a sign. Plaintiff  
18 got the loader and approached the batch office, stopped the loader,  
19 and got out to ask Achenbach and Joe Robertson, a co-worker who was  
20 the senior ready mix driver at Linnton, to help him put the sign  
21 into the loader. Pltf Depo. at pp. 77. Plaintiff apparently  
22 neglected to set the parking brake, and the loader bumped into the  
23 batch office. Id. at pp. 77-79. Plaintiff got out of the loader  
24

---

25 <sup>1</sup> The other African-American employee at Linnton was Jarvis  
26 Campbell, who is also a plaintiff in a case against defendant.  
27 That case, pending in this Court and assigned civil case number  
28 CV-10-242-HU, is a companion case with the instant case, but has  
not been consolidated. They remain separate cases and I treat  
them separately.

1 was approaching the office when he overheard Achenbach and  
2 Robertson speaking and refer to him as a nigger. Id. at pp. 77-80.  
3 He indicated that it could have been either one of them, or both,  
4 using the word. Id. at p. 80. Plaintiff received a verbal warning  
5 from Don Kincaid, defendant's Metro Ready Mix Operations Manager,  
6 regarding his causing the loader to bump into the entry deck of the  
7 batch office. Deft Exh. 7 at p. 2.

8 Plaintiff states that one of his co-workers at Linnton, Eric  
9 Branson, told plaintiff that he (Branson) had overheard Achenbach  
10 and Robertson use the word nigger in reference to plaintiff and  
11 Campbell. Pltf Depo. at pp. 86-87, 96. In addition, two other co-  
12 workers, Denni Chrisler and Sam Castillo, told plaintiff that they  
13 heard Achenbach or Robertson use derogatory words towards plaintiff  
14 and Campbell. Id. at p. 96. Castillo states that he overheard  
15 Achenbach say, "[t]hat stupid fucking nigger, can't back it up, the  
16 truck," in reference to Campbell trying to back up one of the  
17 trucks in the dark. Castillo Depo. at p. 29.

18 On a separate occasion, another of plaintiff's Linnton co-  
19 workers, Susan Erwin, used the term "nigger-rigged" when referring  
20 to the "really, really old" condition of the plant and the fact  
21 that it would break down. Erwin Depo. at p. 26.<sup>2</sup> At the time,  
22

---

23 <sup>2</sup> In the summary judgment record in the Grimmatt case, the  
24 record is unclear as to when this happened. The record developed  
25 in the Campbell case, however, indicates that this incident  
26 occurred in September 2009, after Grimmatt was terminated.  
27 However, as I announced at oral argument, because the cases are  
28 not consolidated and are pending here as separate, individual  
cases, I consider each record separately. Thus, for purposes of  
the summary judgment motion in Grimmatt, because there is no  
evidence of when Erwin made the comment and I construe all  
inferences in favor of plaintiff, I consider the comment to have

1 Erwin was with Peter Nontavarnit, John Ratcliff, and Campbell.  
2 Ratcliff is African-American. Plaintiff was not there.

3 Immediately after using the term, Erwin apologized to Campbell  
4 and Ratcliff told her not to worry about it. Id. at p. 30. The  
5 record is unclear as to how management became aware of Erwin's  
6 comment, but at some point Brian Gray, defendant's Metro Vice-  
7 President - General Manager, called and talked to her about it and  
8 determined, apparently, that it was an "accident." Id. at p. 27.  
9 Erwin assured Gray it would never happen again. Id. It is unclear  
10 when this call occurred.

11 Nontavarnit heard Robertson use racial slurs such as  
12 "wetback," "spic," and "beaner," a handful of times. Nontavarnit  
13 Depo. at pp. 34-35. He also heard Achenbach use the term "beaner"  
14 as well. Id. at p. 35. Other drivers would make comments to  
15 Nontavarnit, who is Asian, about "Asian drivers." Id. at pp. 38-  
16 39.

17 Nontavarnit testified that he heard Achenbach make comments  
18 about wanting to get rid of plaintiff. Id. at p. 32. According to  
19 Nontavarnit, Achenbach complained that plaintiff wasn't pulling his  
20 weight and he wanted to get rid of him. Id. at pp. 32-33.  
21 Nontavarnit denied that Achenbach had a specific plan in mind. Id.  
22 Nontavarnit further stated that he heard Robertson state that he  
23 also wanted to get plaintiff terminated or make him quit. Id. at  
24 p. 36. Nontavarnit could not recall how many times he heard  
25 Robertson make such comments. Id.

26 In August 2007, plaintiff contacted defendant's Human  
27 \_\_\_\_\_  
28 been made during plaintiff's tenure at Linnton.

1 Resources Director Sarah Stevens (formerly Sarah La Chappelle), to  
2 complain about the racial name calling. Pltf Depo. at p. 102.  
3 Approximately two weeks later, Stevens interviewed plaintiff,  
4 Achenbach, and others. Id. at pp. 102-03.

5 Stevens's written investigation report suggests that plaintiff  
6 contacted her on August 27, 2007. Pltf Exh. 9 at p. 12 (Depo. Exh.  
7 36). She spoke with plaintiff, Achenbach, Robertson, and Campbell.  
8 Id. Plaintiff had identified Robertson as the "main instigator,"  
9 but also indicated that Achenbach was involved. Id. In the  
10 "relevant facts" section of her report, Stevens noted that both  
11 plaintiff and Campbell did not like the manner in which Robertson  
12 bossed them around. Id. They characterized him as disrespectful  
13 and a jerk. Id. Stevens noted that an individual that plaintiff  
14 and Campbell refused to name to Stevens, had told both plaintiff  
15 and Campbell that this person had heard Robertson, in the office,  
16 on the phone with his wife, refer to plaintiff as a "lazy nigger."  
17 Id. Plaintiff and Campbell had promised this individual  
18 confidentiality so they refused to name the person to Stevens. Id.  
19 Achenbach denied ever using the word nigger. Id. So did  
20 Robertson. Id. Stevens noted that in her interviews, "[s]everal  
21 references to racial terms were brought up by different people, as  
22 used in 'joking,' with others such as 'spick' [sic] and 'croust'  
23 [sic] and 'this black man' etc. None of these were made or in  
24 reference to [plaintiff.]" Id.

25 As for her conclusions, the only conclusion Stevens made  
26 regarding the use of racial slurs was that "[t]he culture at  
27 Linnton uses racial terms and it is unacceptable, however, there is  
28 not a pattern of racial comments or otherwise harassing or



1 discriminatory activity going on at Linnton with regard to  
2 [plaintiff]." Id.

3 Her recommendations were: (1) Gray and Kincaid were to meet  
4 with Achenbach and "lay out formal expectations of him as a  
5 supervisor and his obligations to ensure a work environment free of  
6 harassment and discrimination of any kind"; (2) "[p]lan and conduct  
7 supervisory training on the topic of harassment (sexual and racial  
8 and otherwise respectful behaviors); (3) "[r]eassign work  
9 assignments such that [Robertson] is not in a supervisory role";  
10 and (4) "[e]nsure [plaintiff] understands his job responsibilities  
11 include plant maintenance, cleanup and labor. Ensure [plaintiff]  
12 knows that we do not tolerate harassing or discriminatory activity  
13 and that if he witnesses or experiences anything of this nature, to  
14 bring it to the attention of management." Id. In describing these  
15 recommendations in deposition, Stevens noted that none of the  
16 "outcomes" was "disciplinary exactly." Stevens Depo. at p. 29.

17 Stevens believes Kincaid met with the crew, as noted in her  
18 second recommendation, to make sure that there should be no  
19 comments or joking about race, sex, or religion. Stevens Depo. at  
20 p. 28. She was not present for the meeting, however. Id.

21 Plaintiff testified that he subsequently called Stevens, maybe  
22 twice, he could not recall, and left her a message, but he never  
23 heard back from her. Pltf Depo. at p. 112. At some point, he  
24 contacted Gray and left a message for him. Id. at pp. 112-13. He  
25 could not remember when this was, but it was after he had left a  
26 message with Stevens. Id. He indicated that it took Gray three  
27 weeks to get back to him. Id.

28 Plaintiff explained that he called Gray because "there wasn't

1 nothing moving and it was just business as usual." Id. at p. 113.

2 He indicated that the harassment, including the derogatory talking  
3 and the name calling, had continued. Id. at p. 114.

4 On October 11, 2007, Kincaid put Achenbach on a performance  
5 improvement plan as a result of recommendations by Stevens in her  
6 report. Deft Exh. 7 at pp. 11-12; Kincaid Depo. at pp. 39-40, 51.

7 On or about October 12, 2007, Kincaid met with Achenbach and  
8 plaintiff to discuss and outline plaintiff's duties as a ready mix  
9 loader at Linnton. Deft Exh. 7 at pp. 3, 4. A "duties list"  
10 outlined the specific responsibilities of the position. Id. at p.

11 4. Gray stated that he and Kincaid discussed the meeting, although  
12 Gray did not attend. Gray Depo. at p. 35. The purpose of the  
13 meeting, according to Gray, was to clearly identify plaintiff's  
14 responsibilities. Id. He also noted that there had been some  
15 complaints that plaintiff had been lazy and unwilling to get off  
16 the loader. Id.; see also Stevens Depo. at p. 29 (Kincaid was to  
17 make sure plaintiff understood what his full responsibilities were  
18 as a loader-operator, so that there weren't any issues about what  
19 he was expected to do, which would include getting off the loader  
20 and helping with other things at the Linnton plant). Plaintiff  
21 stated that he was frustrated with Robertson issuing instructions  
22 to him and he believed that the meeting Kincaid held with Achenbach  
23 and plaintiff regarding plaintiff's job duties was to clarify with  
24 both of them what plaintiff's responsibilities were in light of  
25 this issue with Robertson. Pltf Depo. at pp. 131-32. Plaintiff  
26 appreciated Kincaid's attempt at this clarification. Id. at p.  
27 133.

28 On or about May 21, 2008, plaintiff got into a heated

1 discussion with his co-worker Castillo. Castillo Depo. at p. 35.  
2 Castillo told plaintiff to "get his fat ass off the loader," and  
3 plaintiff called Castillo a "wetback." Id. Nontavarnit witnessed  
4 the incident. Id. Achenbach was either there or very close by  
5 because Castillo states that Nontavarnit "was there, and then  
6 [Achenbach] came out." Id. at p. 34. The incident was resolved at  
7 the time and plaintiff and Castillo apologized to one another. Id.  
8 at p. 36.

9 In the summer of 2008, plaintiff walked into the office at  
10 the Linnton site and saw a picture of then presidential candidate  
11 Barack Obama. Pltf Depo. at p. 138. As described by Campbell,  
12 there were two pictures on one piece of paper. One was of a monkey  
13 with Obama's face on it and the other was Obama in traditional  
14 Middle Eastern style clothing, with a caption asking "do you want  
15 this to be your president." Campbell Depo. at pp. 167-68  
16 (describing two separate pictures); see also Pltf Depo. at pp. 138-  
17 40 (describing seeing picture with Middle Eastern headdress and  
18 indicating he saw only that one picture).

19 Plaintiff was frustrated and angry. Pltf Depo. at pp. 140-41.  
20 He walked out of the room. Id. He does not know who put the  
21 photos there. Id.

22 Plaintiff was terminated on November 14, 2008. Before he was  
23 terminated, he was called into the office to meet with Gray and  
24 Kincaid. Pltf Depo. at pp. 153-55. According to plaintiff, Gray  
25 told him he was being "laid off or terminated, whatever." Id. at  
26 p. 154. They met for ten to twenty minutes and plaintiff received  
27 his last check. Id. They asked him to sign papers giving him an  
28 additional two months of pay in exchange for a release. Id.

1 Plaintiff declined to sign the release because he had never been  
2 laid off from a job where he had been asked to sign a release or  
3 waiver of claims. Id. at pp. 154-55. It did not make sense to  
4 him. Id. at p. 155. Plaintiff contends that during the meeting,  
5 Gray said to Kincaid that Dave Bull, the president of the company,  
6 would be "glad to get this one," referring to plaintiff, to sign  
7 the release papers. Id. at p. 155.

8 The written termination notice lists "Laid Off" as the reason  
9 for the termination. Deft Exh. 7 at p. 7. It explains that  
10 plaintiff's position as the loader operator at Linnton was  
11 eliminated due to the slow economy. Id. Because he did not  
12 possess a commercial driver's license, a driver's position was not  
13 offered. Id. He was rated "average" in several work categories  
14 except for "quantity of work," in which he was rated "fair," and  
15 under "attitude," he was rated both "average" and "excel." Id.  
16 Defendant indicated it would re-employ plaintiff. Id.

#### 17 STANDARDS

18 Summary judgment is appropriate if there is no genuine issue  
19 of material fact and the moving party is entitled to judgment as a  
20 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
21 initial responsibility of informing the court of the basis of its  
22 motion, and identifying those portions of "'pleadings, depositions,  
23 answers to interrogatories, and admissions on file, together with  
24 the affidavits, if any,' which it believes demonstrate the absence  
25 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
26 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

27 "If the moving party meets its initial burden of showing 'the  
28 absence of a material and triable issue of fact,' 'the burden then

1 moves to the opposing party, who must present significant probative  
 2 evidence tending to support its claim or defense.'" Intel Corp. v.  
 3 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
 4 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
 5 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
 6 designate facts showing an issue for trial. Celotex, 477 U.S. at  
 7 322-23.

8 The substantive law governing a claim determines whether a  
 9 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
 10 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
 11 to the existence of a genuine issue of fact must be resolved  
 12 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
 13 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
 14 drawn from the facts in the light most favorable to the nonmoving  
 15 party. T.W. Elec. Serv., 809 F.2d at 630-31.

16 If the factual context makes the nonmoving party's claim as to  
 17 the existence of a material issue of fact implausible, that party  
 18 must come forward with more persuasive evidence to support his  
 19 claim than would otherwise be necessary. Id.; In re Agricultural  
 20 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
 21 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
 22 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 23 DISCUSSION

24 Plaintiff's section 1981 claim has three parts: (1) disparate  
 25 treatment, (2) hostile environment, and (3) retaliation. I address  
 26 them in turn, before discussing the IIED claim.

27 / / /

28 / / /

1 I. Section 1981 Claim

2 A. Section 1981 Claims Generally

3 "Among other things, § 1981 guarantees 'all persons' the right  
4 to 'make and enforce contracts.'" Johnson v. Riverside Healthcare  
5 Sys, LP, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting 42 U.S.C. §  
6 1981(a)). "This right includes the right to the 'enjoyment of all  
7 benefits, privileges, terms, and conditions of the contractual  
8 relationship,' including the relationship between employer and  
9 employee." Id. (quoting section 1981(b)).

10 In the employment context, courts apply Title VII standards to  
11 section 1981 claims. See Manatt v. Bank of America, NA, 339 F.3d  
12 792, 797 (9th Cir. 2003) (the "legal principles guiding a court in  
13 a Title VII dispute apply with equal force in a § 1981 action").

14 A plaintiff may prevail on summary judgment by providing  
15 direct evidence of discrimination or by relying on circumstantial  
16 or indirect evidence and satisfying the burden-shifting framework  
17 of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas  
18 Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).  
19 See Cornwell v. Electra Cent. Credit Un., 439 F.3d 1018, 1028-30  
20 (9th Cir. 2006).

21 The burden-shifting framework requires the plaintiff to  
22 establish a prima facie case of unlawful discrimination followed by  
23 the defendant articulating a legitimate, nondiscriminatory reason  
24 for its action. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122  
25 n. 16 (9th Cir. 2004). If the defendant does so, the plaintiff  
26 must show that the articulated reason is a pretext for  
27 discrimination. Id.; Aragon v. Republic Silver State Disposal,  
28 Inc., 292 F.3d 654, 658-59 (9th Cir. 2002).

1 Defendant notes that the statute of limitations on section  
2 1981 claims is four years. Jones v. R.R. Donnelley & Sons Co., 541  
3 U.S. 369, 382-83 (2004); Thinket Ink Info. Resources, Inc. v. Sun  
4 Microsystems, Inc., 368 F.3d 1053, 1060-61 (9th Cir. 1004); 28  
5 U.S.C. § 1658. Plaintiff filed this action on February 5, 2010.<sup>3</sup>  
6 As a result, defendant states it is entitled to summary judgment on  
7 plaintiff's section 1981 claim to the extent it is based on events  
8 which occurred before February 5, 2006.

9 In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101,  
10 113 (2002), the Supreme Court limited the use of the continuing  
11 violation theory in some contexts. The Court made an important  
12 distinction between disparate treatment discrimination and  
13 retaliation claims on the one hand, and hostile environment claims  
14 on the other. 536 U.S. at 115. "Hostile environment claims are  
15 different in kind from discrete acts. Their very nature involves  
16 repeated conduct." Id. "A hostile work environment claim is  
17 composed of a series of separate acts that collectively constitute  
18 one 'unlawful employment practice.'" Id. at 117. Because a  
19 hostile environment claim "encompasses a single unlawful employment  
20 practice," the employee "need only file a charge within [the  
21 applicable limitations period] of any act that is part of the  
22 hostile work environment." Id. at 117, 119.

23 In contrast, discrete acts are incidents of discrimination,  
24 "such as termination, failure to promote, denial of transfer, or  
25 refusal to hire," that constitute a separate, actionable "unlawful  
26

---

27 <sup>3</sup> Plaintiff filed the case in state court on that date, and  
28 defendant later removed the action to this Court.

1 employment practice" and which are "not actionable if time barred,  
2 even when they are related to acts alleged in timely filed  
3 charges." Id. at 113, 114.

4 As discussed below, none of plaintiff's alleged adverse  
5 employment actions occurred before February 5, 2006, so none of  
6 them are time-barred. The alleged retaliatory termination also  
7 occurred after that date, so it is similarly timely. As to the  
8 hostile environment claim, because, as discussed below, the acts of  
9 Wetten at the Waterview site are part of a pattern of conduct which  
10 continued into the limitations period, none of the hostile  
11 environment claim is time-barred.

12 B. Disparate Treatment Claim

13 To establish a prima facie case of race discrimination,  
14 plaintiff must show (1) that he is African-American; (2) that he  
15 performed his job adequately; (3) that he suffered an adverse  
16 employment action; and (4) that similarly situated individuals  
17 outside his protected class were treated differently. Cornwell,  
18 439 F.3d at 1031.

19 There is no question that plaintiff is African-American.  
20 Defendant does not challenge that plaintiff performed his job  
21 adequately.

22 In his memorandum in opposition to the summary judgment  
23 motion, plaintiff appears to raise five discrete adverse employment  
24 actions taken against him: (1) subjection to habitual harassment  
25 and discrimination by Achenbach, his supervisor, because of his  
26 race; (2) working in conditions where he was subjected to racial  
27 slurs and harassment by his co-workers; (3) knowledge by human  
28 resources staff and management of the racial slurs and harassment



1 occurring at the workplace and allowing the atmosphere of racial  
2 discrimination to continue; (4) being treated differently than his  
3 non-African-American co-workers; (5) being terminated because of  
4 his race. Pltf Resp. Mem. at p. 9.

5 I agree with defendant that the first three are not cognizable  
6 as adverse employment actions. For the purposes of a  
7 discrimination claim, an adverse employment action is one which  
8 "materially affects the compensation, terms, conditions, or  
9 privileges of employment." Davis v. Team Elec. Co., 520 F.3d 1080,  
10 1089 (9th Cir. 2008) (internal quotation, brackets, and ellipsis  
11 omitted); see also Kang v. U. Lim Am., Inc., 296 F.3d 810, 818-19  
12 (9th Cir. 2002) (plaintiff established a prima facie case of  
13 disparate treatment where the defendant subjected the plaintiff to  
14 adverse employment actions including discriminatory overtime, and  
15 termination, "that constituted a material change in the terms and  
16 conditions of [the plaintiff's] employment") (internal quotation  
17 omitted); Chuang v. University of Cal. Davis, Bd. of Trustees, 225  
18 F.3d 1115, 1126 (9th Cir. 2000) (finding that "[t]he removal of or  
19 substantial interference with work facilities important to the  
20 performance of the job constitutes a material change in the terms  
21 and conditions of a person's employment" and therefore qualifies as  
22 an adverse employment action, but also finding that the employer's  
23 failure to respond to grievances did not amount to an adverse  
24 employment action because "it did not materially affect the  
25 compensation, terms, conditions, or privileges of the [plaintiffs']  
26 employment"); Kortan v. California Youth Auth., 217 F.3d 1104, 1113  
27 (9th Cir. 2000) (no adverse employment action when the plaintiff  
28 was not demoted, not stripped of work responsibilities, not handed

1 different or more burdensome work activities, not fired or  
2 suspended, not denied any raises, and not reduced in salary or any  
3 other benefit); Campos v. Portland Public Schs., No. 99-1744-MA,  
4 2000 U.S. Dist. Lexis 21617, at \*16-17 (D. Or. Nov. 9, 2000) (no  
5 adverse employment action when plaintiff's job demotion was not  
6 accompanied by any salary or status change or any indication that  
7 her new position was less favorable).

8 As suggested in Morgan in the context of addressing the  
9 continuing violation theory, a disparate treatment claim involves  
10 discrete, tangible acts and thus, I agree with defendant that the  
11 first three alleged adverse employment actions listed by plaintiff  
12 are part of the hostile environment claim because habitual  
13 harassment by Achenbach, being subjected to racial slurs and  
14 harassment by co-workers, and management's failure to do anything  
15 to address the situation are not discrete acts and do not, without  
16 more, materially affect the compensation, terms, conditions, or  
17 privileges of plaintiff's employment in a tangible way.

18 As for the termination allegation, I do not read plaintiff's  
19 memorandum to suggest that the termination is a separate basis for  
20 the disparate treatment claim because his argument regarding the  
21 termination is that the termination was in retaliation for having  
22 complained to Stevens about the racial slurs. Thus, I agree with  
23 defendant that the allegations based on termination are properly  
24 analyzed under the retaliation part of the section 1981 claim, not  
25 as a disparate treatment claim.

26 Thus, for an adverse employment action, what remains is  
27 plaintiff's allegation that he was treated differently than non-  
28 African-American co-workers. To support this argument, plaintiff

1 identifies one discrete, tangible adverse employment action where  
2 he was treated differently than a non-African-American employee:  
3 receiving discipline for calling Castillo a "wetback," while  
4 Caucasian employees, whom management knew also used racial slurs,  
5 received no discipline. As described above, plaintiff received a  
6 written warning as a result of his insult to Castillo. The  
7 evidence shows that certain supervisory personnel knew about  
8 Wetten's use of the words nigger, or nigger-head, or African  
9 ingenuity, yet he received no written warning. Erwin also used the  
10 term nigger-rigged and Gray did not discipline her when he learned  
11 of the incident. Robertson and Achenbach apparently employed  
12 certain slurs such as "beaner" (both Achenbach and Robertson), as  
13 well as "wetback" and "spic" (Robertson), without written  
14 discipline.

15 Plaintiff has raised material issues of fact with respect to  
16 his treatment being different than Caucasian employees for the use  
17 of racial slurs. But, the written warning he received is not an  
18 adverse employment action under the law. One Ninth Circuit case  
19 holds that a written warning placed in an employee's personnel file  
20 can constitute an adverse employment action under certain  
21 circumstances. Fonseca v. Sysco Food Servs. of Az., Inc., 374 F.3d  
22 840, 848 (9th Cir. 2004). In Fonseca, the employee was initially  
23 suspended for an incident, with the suspension then reduced to a  
24 warning letter. Id. The Ninth Circuit held that the "warning  
25 letter still constitutes an adverse employment action, particularly  
26 since Sysco publicizes all discipline to all its employees." Id.  
27 (citing Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)  
28 ("Transfers of job duties and undeserved performance ratings, if

1 proven, would constitute 'adverse employment decisions[.]')).

2        Fonseca, and the case on which it relied Yartzoff, are  
3 distinguishable from the instant case. First, unlike Fonseca,  
4 there is no evidence here that plaintiff's warning letter became  
5 public or was broadcast in any way to all other employees. Second,  
6 while Fonseca was not a retaliation case, Yartzoff, the case it  
7 cited for the proposition that a warning letter or negative review  
8 can be considered an adverse employment action, was a retaliation  
9 case. The concept of "adverse employment action" is more broadly  
10 construed in the retaliation context than in the substantive  
11 discrimination context in a disparate treatment claim. Burlington  
12 N. & Santa Fe Rwy Co. v. White, 546 U.S. 53, 60-63 (2006) (anti-  
13 retaliation provision of Title VII, unlike the substantive  
14 provision, is not limited to discriminatory actions that affect the  
15 terms and conditions of employment; defining adverse employment  
16 action for purposes of retaliation claims as an action that a  
17 reasonable employee would have found materially adverse, meaning  
18 action that "might have dissuaded a reasonable worker from making  
19 or supporting a charge of discrimination") (internal quotation  
20 omitted). Thus, Fonseca, the non-retaliation case, inappropriately  
21 cited to Yartzoff, the retaliation case, for the proposition that  
22 a warning letter with no material impact on the employee's working  
23 conditions, constitutes an adverse employment action in a disparate  
24 treatment claim.

25        Additionally, several cases in this district hold that a  
26 warning letter is not an adverse employment action. E.g., Hoang v.  
27 Wells Fargo Bank, N.A., 724 F. Supp. 2d 1094, 1104 (D. Or. 2010)  
28 (warning letter which affected no materially adverse change in the

1 terms and conditions of the plaintiff's employment was not an  
2 adverse employment action); Tudor Delcey v. A-Dec, Inc., No. CV-05-  
3 1728-PK, 2008 WL 123855, at \*9 (D. Or. Jan. 9, 2008) (written  
4 warning was not an adverse employment action when it had no impact  
5 on the employee's status).

6 Here, the written warning plaintiff received for the racial  
7 slur to Castillo is not an adverse employment action. Because this  
8 is the only allegedly adverse action plaintiff cites in support of  
9 his disparate treatment claim, I grant summary judgment to  
10 defendant on that part of plaintiff's section 1981 claim.

11 C. Hostile Environment Claim

12 To establish a prima facie case for a hostile work environment  
13 claim, plaintiff "must raise a triable issue of fact as to whether  
14 (1) the defendants subjected [him] to verbal or physical conduct  
15 based on [his] race; (2) the conduct was unwelcome; and (3) the  
16 conduct was sufficiently severe or pervasive to alter the  
17 conditions of [his] employment and create an abusive working  
18 environment." Surrell v. California Water Serv. Co., 518 F.3d  
19 1097, 1108 (9th Cir. 2008).

20 Defendant argues that plaintiff fails to create an issue of  
21 fact as to whether the conduct was sufficiently severe or  
22 pervasive. I disagree.

23 First, the evidence is that Wetten regularly used the word  
24 "nigger" in some manner around plaintiff beginning in August 2005,  
25 at the inception of plaintiff's employment at Waterview, until  
26 plaintiff went on medical leave and left Waterview in December  
27 2006. This pattern of similar conduct continued into the post-  
28 February 5, 2006 limitations period, satisfying Morgan's conditions

1 for application of the continuing violation doctrine in a hostile  
2 environment claim.

3 Examining the facts in a light most favorable to plaintiff,  
4 the evidence is that Wetten regularly used the term "nigger" around  
5 plaintiff, that he would apologize for using it at times, but would  
6 resume using it again. Wetten admits he used the term around  
7 plaintiff in the workplace. Plaintiff's testimony is that this  
8 occurred regularly, more frequently than every other week. The  
9 evidence is also that Wetten used the term "nigger-heads" when  
10 referring to the rocks in the roadbed, and used, at least once, the  
11 term "nigger-rigged," and referred to an attempt to fix  
12 malfunctioning equipment as "African ingenuity."

13 Although there is a dispute in the record regarding whether  
14 plaintiff's supervisor Russell and the Waterview site supervisor  
15 Druery knew about Wetten's regular use of the term nigger,  
16 plaintiff's testimony must be credited on summary judgment.  
17 Plaintiff states that he reported the use of the word to Russell  
18 and Druery, and, moreover, that Russell and Druery themselves heard  
19 Wetten use the term. According to plaintiff, Russell and Druery  
20 did nothing about it. Druery does admit to hearing Wetten use the  
21 term "nigger-rigged," and then "African ingenuity," and other than  
22 verbally warning Wetten, he issued no discipline.

23 In addition, plaintiff described hearing Henshaw state over  
24 the radio that "Dave's black ass is going to work today." And,  
25 Wetten testified that Henshaw used the word nigger around  
26 plaintiff.

27 At Linnton, where plaintiff was transferred after his medical  
28 leave, the specific evidence regarding use of the word "nigger"

1 shows less frequent use than by Wetten at Waterview. At Linnton,  
2 plaintiff overheard Robertson and Achenbach using the word "nigger"  
3 in reference to plaintiff only once, when he walked into the office  
4 after hitting the batch office porch with the loader. But, Branson  
5 told plaintiff that Branson had overheard Achenbach and Robertson  
6 use the word nigger to refer to plaintiff and Campbell, although  
7 there is no evidence showing that they did this in plaintiff's  
8 presence. And, Castillo told plaintiff that he heard Achenbach or  
9 Robertson use derogatory words towards plaintiff and Campbell,  
10 including Achenbach referring to Campbell as a "stupid, fucking  
11 nigger" when he had problems backing up a truck.

12 Erwin's episode using the term "nigger rigged" in the presence  
13 of Campbell and another African-American employee, but not in  
14 plaintiff's presence, also occurred at Linnton. Nontavarnit  
15 testified that he heard Robertson use terms like wetback, spic, and  
16 beaner, and had heard Achenbach use the term beaner. Additionally,  
17 plaintiff saw the offensive pictures of then-candidate Obama.

18 In describing the evidence, defendant accurately describes the  
19 events at Waterview, but minimizes the incidents at Linnton by  
20 omitting any reference to Erwin's comment or to the evidence that  
21 co-workers told plaintiff that Achenbach and Robertson referred to  
22 him as nigger and used derogatory words toward plaintiff and  
23 Campbell.

24 Defendant relies on a 1990 Ninth Circuit case to argue that  
25 the evidence here falls short of suggesting a hostile environment.  
26 In Sanchez v. City of Santa Ana, 936 F.2d 1027 (9th Cir. 1990), the  
27 court affirmed a directed verdict in favor of the defendant on a  
28 hostile environment claim where Hispanic police officers relied on

1 evidence that a racially offensive cartoon had been posted, there  
2 had been use of racially offensive slurs, they had been assigned  
3 unsafe vehicles, they were victims of selective enforcement of  
4 police department rules and peer ostracism, they failed to receive  
5 adequate police backup, and secret personnel files had been  
6 maintained. Id. at 1031, 1037.

7 Moreover, defendant argues, the single time plaintiff  
8 complained to human resources, defendant investigated the matter  
9 and took corrective action to the extent it was needed. Thus,  
10 defendant argues, the evidence in this case belies plaintiff's  
11 claim that defendant condoned a hostile work environment.

12 But, as plaintiff notes, the use of the word "nigger" is  
13 especially offensive. E.g., Swinton v. Potomac Corp., 270 F.3d  
14 794, 817 (9th Cir. 2001) (the word "nigger" is "perhaps the most  
15 offensive and inflammatory racial slur in English, . . . a word  
16 expressive of racial hatred and bigotry") (internal quotation  
17 omitted); Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130  
18 F.3d 349, 356 (8th Cir. 1997) (the "use of the word 'nigger,' even  
19 in jest, can be evidence of racial antipathy") (internal quotation  
20 omitted); McGinest, 360 F.3d at 1116 ("It is beyond question that  
21 the use of the word 'nigger' is highly offensive and demeaning,  
22 evoking a history of racial violence, brutality, and  
23 subordination").

24 Without question, the conditions at Waterview at least create  
25 a question of fact as to whether they were sufficiently severe or  
26 pervasive to support a hostile environment claim under section  
27 1981. No separate discussion of the conditions at Linnton is  
28 required. Defendant brings only one motion, and the evidence



1 regarding what occurred at Waterview is enough to create an issue  
2 of fact on this claim.

3       However, even if the events at Linnton were looked at  
4 separately, I still deny summary judgment on that aspect of  
5 plaintiff's claim. While the incidents at Linnton which plaintiff  
6 personally observed are few (only two - hearing one reference by  
7 Achenbach/Robertson to plaintiff as a "nigger" and the Obama  
8 pictures), his testimony that his co-workers told him that  
9 Achenbach and Robertson referred to plaintiff and Campbell as  
10 niggers is unrebutted. While it is unclear from plaintiff's  
11 testimony what plaintiff understood as to the frequency with which  
12 Achenbach and Robertson used the term, the record establishes that  
13 he had knowledge of its use. This, coupled with the two overtly  
14 racial incidents, are enough for a reasonable factfinder to  
15 conclude that the environment at either Waterville or Linnton was  
16 severe or pervasive to be considered a hostile environment. My  
17 conclusion takes into consideration the particular word "nigger,"  
18 which, as indicated by the cases above, is so hostile and  
19 antagonistic that very few uses are required to make the  
20 environment severely hostile.

21       Additionally, the record, examined in the light most favorable  
22 to plaintiff, shows that his complaint to Russell and Druery at  
23 Waterville regarding Wetten's repeated use of "nigger" resulted in  
24 no action against Wetten. And, when Druery did overhear Wetten use  
25 the term "nigger-rigged," he issued an undocumented verbal warning  
26 with no other repercussion. When Wetten subsequently used the term  
27 "African ingenuity," Druery did nothing more than glare at Wetten.  
28 Thus, the supervisory personnel at Waterville were unresponsive to

1 plaintiff's complaints.

2       At Linnton, a reasonable factfinder could conclude that  
3 Stevens's investigation and recommendations were ineffective. At  
4 least on summary judgment, when plaintiff states that he tried to  
5 call her again, and also called Gray to complain about continued  
6 harassment, it can be inferred that defendant's response to  
7 plaintiff's August 2007 complaint was ineffective. While  
8 plaintiff's deposition testimony regarding any specific incidents  
9 of racial harassment that occurred after August 2007, is vague, the  
10 evidence in the record regarding his need to call Stevens and Gray  
11 subsequent to his August 2007 report and defendant's investigation,  
12 because of what plaintiff perceived to be continuing harassment, is  
13 un rebutted and suggests that defendant's "remedial measures" in  
14 response to the August 2007 complaint were insufficient.

15       Finally, while the perpetrators of the offensive conduct were  
16 different at each site, this action is against defendant who is  
17 ultimately responsible for the conduct of all of its personnel.  
18 Taking the evidence in a light most favorable to plaintiff, the  
19 record is capable of showing that defendant tolerated a racially  
20 hostile atmosphere at more than one location, that supervisors at  
21 both sites either actually engaged in the offensive conduct  
22 (Achenbach) or were aware of it (Druery, Russell), and yet the  
23 conduct continued. This is sufficient, on summary judgment, to  
24 show a pattern of similar conduct at both locations, making summary  
25 judgment inappropriate whether the sites are considered singly or  
26 together.

27       I deny the motion on the hostile environment claim.

28 / / /

1 D. Retaliation Claim

2 "Section 1981 prohibits 'racial discrimination in taking  
3 retaliatory action.'" Surrell, 518 F.3d at 1108 (quoting Manatt,  
4 339 F.3d at 798). To establish a prima facie case of retaliation,  
5 a plaintiff must prove (1) he engaged in a protected activity; (2)  
6 he suffered an adverse employment action; and (3) there was a  
7 causal connection between the two. Id. at 1109. Once established,  
8 the burden shifts to the defendant to set forth a legitimate,  
9 non-retaliatory reason for its actions. Id. At that point, the  
10 plaintiff must produce evidence to show that the stated reasons  
11 were a pretext for retaliation. Id.

12 There is no dispute that plaintiff engaged in protected  
13 activity by making a race discrimination complaint to Stevens in  
14 August 2007. There is no dispute that he was terminated in  
15 November 2008. The issue on summary judgment is the causal  
16 connection between these two events.

17 Plaintiff may raise an inference of causation by demonstrating  
18 a temporal proximity between the protected activity and any adverse  
19 employment action, or, by demonstrating that the person making the  
20 employment decision was aware that the person had engaged in the  
21 protected activity. Villiarimo v. Aloha Island Air, Inc., 281 F.3d  
22 1054, 1065 (9th Cir. 2001) ("causation can be inferred from timing  
23 alone where an adverse employment action follows on the heels of  
24 protected activity"); Yartzhoff, 809 F.2d at 1376 ("Causation  
25 sufficient to establish the third element of the prima facie case  
26 may be inferred from circumstantial evidence, such as the  
27 employer's knowledge that the plaintiff engaged in protected  
28 activities and the proximity in time between the protected action

1 and the allegedly retaliatory employment decision.").

2 The Ninth Circuit has rejected a bright line temporal  
3 proximity test. Coszalter v. City of Salem, 320 F.3d 968, 977-78  
4 (9th Cir. 2003) (noting that retaliation often follows quickly upon  
5 the act that offended the retaliator, but that is not always so  
6 because for a variety of reasons, some retaliators prefer to take  
7 their time and may wait until the victim is especially vulnerable  
8 or until an especially hurtful action is possible or until they  
9 think the lapse of time disguises their true motivation).

10 Plaintiff notes that the decisionmakers in his termination  
11 were Stevens, Kincaid, and Gray, all of whom knew about his  
12 complaint of racial harassment. Although the time between his  
13 complaint and his termination is about fifteen months, plaintiff  
14 argues that in response to his complaint to Stevens, defendant  
15 promptly, and for the first time, questioned his work ethic in an  
16 attempt to establish the ground work for later laying him off. He  
17 also contends that in September 2007, defendant began to make his  
18 transfer to Linnton official, which, plaintiff contends, put him at  
19 the bottom of the seniority list, resulting in his being laid off  
20 before less senior employees.

21 1. Performance Issues

22 Plaintiff states that before his complaint to Stevens, he had  
23 "met expectations" on his "hourly performance evaluations." He  
24 cites to two performance evaluations. Pltf Exh. 9 at pp. 2, 5.  
25 One of them is a performance review from July 2008, after his  
26 August 2007 complaint to Stevens. Thus, it does not support his  
27 position that before his August 2007 complaint to Stevens, he  
28 received "met expectations" performance reviews.

1       The other, dated July 2007, does show that in the categories  
2 of safety, attitude, quality, and productivity, plaintiff met  
3 expectations. Id. at p. 2. In the written comments, as opposed to  
4 the check boxes, plaintiff was told to "take more incentive in  
5 keeping yard up and work harder at not overflowing bins." Id.  
6 Plaintiff identified his own goals as wanting to improve his work  
7 habits and relationships with other team members and to keep up on  
8 safety requirements. Id.

9       Next, plaintiff points to the comments made in Stevens's  
10 investigation summary where she notes that (1) there had been  
11 miscommunications between Achenbach and plaintiff regarding leaving  
12 at the end of the day, (2) Robertson and Achenbach believed  
13 plaintiff was lazy and did not do enough clean up or maintenance  
14 work, and only wanted to stay on the loader, despite having been  
15 spoken to about doing the other work, and (3) Campbell noticed that  
16 plaintiff did not get off the loader to do any labor and  
17 maintenance and clean up work around the plant. Id. at p. 12.  
18 Based on this, one of Stevens's conclusions was that "[plaintiff]  
19 is concerned about losing his job at Linnton and this prompted his  
20 complaint. There are legitimate concerns with [plaintiff's] work  
21 performance. It is not up to full expectations." Id. One of  
22 Stevens's recommended actions was to ensure that plaintiff  
23 understood his job responsibilities included plant maintenance,  
24 cleanup, and labor. Id.

25       Based on this, plaintiff argues that the evidence shows that  
26 before making his complaint to Stevens, he had consistently met  
27 expectations in all categories on his performance evaluations, but  
28 after making the complaint, defendant began making accusations,

1 which began in Stevens's own report, that he was not performing his  
2 job up to "full expectations."

3 I note that the July 2007 performance evaluation does indicate  
4 that while plaintiff met expectations, there was a comment that he  
5 needed to "take more incentive in keeping yard up and work harder  
6 at not overflowing bins." Because it does not appear that either  
7 Achenbach or Robertson were involved in issuing this performance  
8 evaluation, it is safe to say that before plaintiff made his  
9 complaint to Stevens, there was an issue with his failure to "keep  
10 up the yard," which I understand to mean the general maintenance  
11 and clean up which Achenbach and Robertson later complained about  
12 to Stevens as part of her investigation.

13 Defendant also notes that while at Waterview, plaintiff had  
14 received two verbal warnings, one for an unexcused absence and  
15 another for unsafe operation of a truck. Pltf Depo. at pp. 54-56;  
16 Exh. 3 to Second Schmidt Declr. at pp. 5, 6. In addition, at  
17 Linnton, he received a verbal warning for damaging the porch of the  
18 batch office with the loader. Pltf Depo. at pp. 76-80; Deft Exh.  
19 7 at p. 2.

20 Defendant further notes that it is undisputed that Achenbach,  
21 Robertson, and Campbell (himself African-American) told Stevens  
22 during her investigation of plaintiff's complaint, that plaintiff's  
23 job performance was lacking because he did not perform enough clean  
24 up and maintenance. Thus, defendant argues that there is no  
25 evidence to support plaintiff's theory that in response to his  
26 complaint about racial slurs, Stevens immediately set out to find  
27 fault with plaintiff's job performance.

28 Clearly, the reports by Achenbach and Robertson to Stevens

1 regarding plaintiff's poor work habits were made after plaintiff  
2 complained about their treatment of him, and thus, considering the  
3 evidence in a light most favorable to plaintiff, their statements  
4 could have been made in retaliation for his complaint. However, as  
5 noted above, there is evidence in the July 2007 evaluation, which  
6 did not involve Achenbach and Robertson, that plaintiff had work  
7 habit problems. And, Campbell, plaintiff's African-American co-  
8 worker, also complained to Stevens about plaintiff.

9 Defendant also states that plaintiff's "met expectations" job  
10 evaluation in July 2008 disproves his theory that defendant,  
11 through Achenbach, Robertson, and Stevens, began a plot to  
12 terminate plaintiff as soon as he complained about racial  
13 harassment by noting performance problems. In July 2008, plaintiff  
14 was again rated as "meets expectations" in the categories of  
15 safety, attitude, quality, and productivity. Pltf Exh. 9 at p. 5.  
16 In the comment section, he was told that he needed to work on not  
17 overloading bins and to understand that "bin bleedover" affects the  
18 quality of the concrete. Id. He was also expected to obtain his  
19 commercial driver's license within a year, before his next  
20 evaluation. Id. I agree with defendant that the "meets  
21 expectations" July 2008 performance review undermines plaintiff's  
22 theory.

23 In summary, the evidence shows that contrary to plaintiff's  
24 argument, he had some noted performance problems before his  
25 complaint to Stevens. The evidence also shows that an independent  
26 African-American co-worker made the same complaint to Stevens  
27 during the investigation of plaintiff's race harassment complaint,  
28 lending some validation to Achenbach's and Robertson's complaints,

1 and creating doubt that those particular comments were motivated by  
2 plaintiff's race harassment complaint. And, despite plaintiff's  
3 argument about defendant laying the groundwork for his layoff with  
4 poor performance comments immediately after his complaint, he  
5 received a "meets expectations" performance evaluation subsequent  
6 to his complaint. Thus, the evidence plaintiff relies on to  
7 support his argument is quite slim.

8 This is a close question regarding what the evidence shows as  
9 to plaintiff's race harassment complaint triggering negative  
10 performance issues. There are some inferences to be made, but,  
11 given the length of time between his complaint and his actual  
12 layoff, and the fact that subsequent to his complaint he received  
13 a meets expectation performance review, they are weak.  
14 Nonetheless, given that Kincaid rated plaintiff's abilities in the  
15 layoff document, conceded that he believed plaintiff had a poor  
16 attitude compared with other Linnton employees, and was one of the  
17 decisionmakers in plaintiff's termination decision, it is possible  
18 that a factfinder could conclude that the seeds for plaintiff's  
19 layoff were initially planted soon after his August 2007 complaint,  
20 creating an issue of fact as to causation. Although sufficient to  
21 survive summary judgment, I note that at trial, depending on how  
22 the evidence comes in, a motion for judgment as a matter of law may  
23 result in the dismissal of this claim before it is sent to a jury.

## 24 2. Reassignment

25 Plaintiff next argues that shortly after his racial harassment  
26 complaint, the decisionmakers involved in his termination, all of  
27 whom were aware of his complaint, began making plans to transfer  
28 him or possibly lay him off, and that this shows causation.



1 Plaintiff points to an email from Kincaid, dated September 4,  
2 2007, to Gray and Stevens. Pltf Exh. 9 at pp. 14-15. There,  
3 Kincaid proposed sending plaintiff back to Waterview, under  
4 Druery's supervision. Id. Kincaid explained that plaintiff, upon  
5 returning from medical leave in February 2007, had been assigned to  
6 the Linnton site due to a temporary need for a loader operator  
7 there, created by the reassignment of the other Linnton loader  
8 operators to two, separate "portable projects." Id. One of those  
9 portable projects was closing on August 31, 2007, and the other one  
10 was going to close a few months later, with the employees due to  
11 return to the metro ready mix operations. Id. at p. 15.

12 Kincaid proposed sending plaintiff back to Waterview or to  
13 another site named Angell Quarry. He noted that Druery had  
14 indicated the move was okay with him, and that between Waterview  
15 and Angell Quarry, he would find work for plaintiff, with a last  
16 resort being a lay off. Id.

17 Then, Kincaid stated that

18 [i]n light of the recent events at Linnton RM involving  
19 [plaintiff, Achenbach, and Robertson,] I realize this  
20 move could be viewed incorrectly. The fact of the matter  
21 is that this move was the plan from the beginning. Both  
22 [plaintiff's and []] assignments at Linnton RM were  
23 *temporary assignments* for the benefit of the company as  
24 a whole to allow Ron [Trommlitz] to supervise the  
25 portable RM projects and also to allow for Jim Dumolt's  
26 retirement to proceed as requested. This is why neither  
27 was officially transferred from the Materials Group to  
28 the Metro RM Group.

24 To me this is the right move. However, due to recent  
25 events at Linnton RM, I would like your review and  
26 approval. I do not want to put our company at any  
27 unnecessary risk although this has been the planned  
28 transition since the beginning of the portable projects.

27 Id.

28 In the end, plaintiff was not moved back to Waterview. In his

1 deposition, Kincaid explained that based on a conversation with  
2 Druery in which Druery stated that the position plaintiff had been  
3 working at Waterview was now filled and Druery did not, in fact,  
4 really have a place for plaintiff, Kincaid decided to have  
5 plaintiff formally join the ready mix division in Lintton. Kincaid  
6 Depo. at pp. 43-44. Based on a conversation with plaintiff that  
7 plaintiff would get his commercial driver's license, Kincaid  
8 believed defendant could use plaintiff in the ready mix division in  
9 different capacities other than as a loader. Kincaid Depo. at pp.  
10 43-44.

11 Thus, plaintiff was officially transferred to Linnton in  
12 December 2007, where he had been working since February 2007. Pltf  
13 Exh. 9 at p. 3. The actual transfer paperwork is dated December  
14 17, 2007, and states that plaintiff was transferred from Waterview  
15 to Linnton with the following conditions: (1) "[c]ompany date of  
16 hire remains intact, new location seniority established upon  
17 transfer"; (2) wages remained at \$17.97 per hour; (3) first full  
18 performance evaluation to occur ninety days from transfer. Id.

19 Plaintiff contends that the official transfer to Waterview  
20 caused him to lose all of his seniority which in turn, made him  
21 first on the list to be laid off. Plaintiff states that absent the  
22 transfer from Waterview to Linnton, there would have been at least  
23 six employees with less seniority who would have been laid off  
24 instead of plaintiff. Those employees are James Armspiger, Irv  
25 Sisco, Mike Price, Ryan Shaw, John Connall, and Bruce Aberle. See  
26 Pltf Exh. 9 at p. 17 ("crusher scorecard" showing list of nineteen  
27 employees, including plaintiff, rated in five areas on a numerical  
28 scorecard, and showing hire dates). Plaintiff states that

1 Armspiger and Price were both groundsman like plaintiff, had been  
 2 hired after plaintiff, and did not possess commercial drivers'  
 3 licenses. Plaintiff contends that had he not been transferred,  
 4 there would have been several other employees that would have been  
 5 up for layoff consideration before plaintiff.

6 Plaintiff cites to two pages of defendant's employee handbook,  
 7 effective October 1, 2008. Pltf Exh. 10. Assuming that this, or  
 8 a similar version was in effect in December 2007 when plaintiff was  
 9 transferred to Linnton, the transfer section states, in relevant  
 10 part, that upon a transfer, "[d]epartment seniority will not pass  
 11 with you. However, Knife River seniority for vacation, insurance,  
 12 and profit-sharing will remain uninterrupted." Id. at p. 2  
 13 (emphasis added).

14 In the "Anniversary" section, it is explained that

15 [t]he date of employment establishes an anniversary date.  
 16 Your employment category and anniversary date determines  
 17 your eligibility for group benefits. Length of service  
 18 or seniority, together with your qualifications and  
 19 abilities play an important role in helping us determine  
 20 eligibility for promotion or transfer. Your relative  
seniority standing and qualifications also enter into  
decisions as to who will be laid off in a reduction of  
work force and the order in which laid-off personnel are  
 called back to work.

21 Your seniority is broken in these circumstances:

- 22 ■ Termination of employment for any reason.
- 23 ■ Continuous absence from work for more than six  
 (6) consecutive months due to layoff.
- 24 ■ Failure to return to work when recalled following  
 a layoff.
- 25 ■ Failure to return to work immediately following  
 a doctor's release to return after any work related  
 or non-work related injury or illness.

26 The years of service you acquire in your employment are  
 27 important. Knife River hopes that you will recognize  
 28 their value and that you will not act in such a way as to  
 lose them without careful thought and good reason on your  
 part.

1 Id. at p. 3 (emphasis added).

2 The "anniversary" section suggests that the date of employment  
3 is the date used for determining seniority for lay off purposes.<sup>4</sup>  
4 Plaintiff's transfer to Linnton does not fall under any of the four  
5 events which cause an employee's seniority to be broken, suggesting  
6 that his hire date did not change for seniority purposes when he  
7 was transferred.

8 However, there is no explanation of the meaning of "department  
9 seniority" which does not pass with the employee upon a transfer.  
10 Thus, the handbook is ambiguous. Although the timing of the August  
11 2007 racial discrimination complaint is pretty far removed from the  
12 November 2008 termination, there are issues of fact regarding the  
13 seniority issue. Plaintiff's official reassignment to Linnton  
14 occurred in December 2007, within the window of time which allows  
15 an inference of causation. The handbook is unclear what  
16 "department seniority" is and without an explanation of that in the  
17 record, plaintiff's theory that the reassignment set him up to be  
18 first in line for layoff, is a reasonable inference.

19 Additionally, as plaintiff notes, the decisionmakers for the  
20 transfer were aware of his race discrimination complaint, and Gray  
21 allegedly told Kincaid that Bull was going to be glad to obtain the  
22 waiver from plaintiff. This is enough to create an issue of fact  
23 on causation based on plaintiff's seniority theory. Again,

---

24  
25 <sup>4</sup> Remarkably, defendant states that "[m]ore importantly,  
26 however, is the absence of any evidence in the record that  
27 seniority is even a factor that Knife River takes into  
28 consideration in determining which employees to terminate during  
a reduction in force. This is perhaps the most glaring of all  
evidentiary deficiencies in plaintiff's theory of causation."  
Deft Reply Mem. at p. 13.

1 however, I consider the causation evidence to be fairly weak and  
2 the totality of the evidence at trial may suggest a different  
3 result.

4 In summary on the section 1981 claim, I grant the motion as to  
5 the disparate treatment part of the claim, but I deny the motion on  
6 the hostile environment and retaliation claims.

7 II. IIED Claim

8 To sustain an IIED claim, plaintiff must show that defendant  
9 intended to inflict severe emotional distress, that defendant's  
10 acts were the cause of plaintiff's severe emotional distress, and  
11 that defendant's acts constituted an extraordinary transgression of  
12 the bounds of socially tolerable conduct. McGanty v. Staudenraus,  
13 321 Or. 532, 563, 901 P.2d 841, 849 (1995); see also Babick v.  
14 Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (to  
15 state an IIED claim under Oregon law, plaintiff must prove, inter  
16 alia, that defendants' actions "constituted an extraordinary  
17 transgression of the bounds of socially tolerable conduct.")  
18 (internal quotation omitted).

19 As a result of some clarification in plaintiff's response  
20 memorandum, it appears that plaintiff bases his claim on certain  
21 acts by Achenbach and Robertson at the Linnton plant, for which  
22 defendant is vicariously liable. The actions are (1) the May 18,  
23 2007 incident when plaintiff overheard Achenbach and/or Robertson  
24 use the word "nigger" in referring to plaintiff; (2) the reports by  
25 co-workers that they overheard Achenbach and Robertson use the word  
26 "nigger" in reference to plaintiff and Campbell; (3) that Achenbach  
27 and Robertson wanted to get rid of plaintiff because he was  
28 African-American.

1 Defendant first notes that the statute of limitations is two  
2 years for the IIED claim, making any incidents before February 5,  
3 2008, not actionable. Or. Rev. Stat. § 12.110(1). Accordingly, I  
4 agree with defendant that the May 2007 reference by Achenbach or  
5 Robertson to plaintiff as a nigger, which plaintiff overheard, is  
6 not a part of this claim.

7 Second, defendant argues that the evidence does not support  
8 either the intent or outrageous elements. With the May 2007  
9 comment by Achenbach or Robertson considered untimely, there is no  
10 evidence in support of the IIED claim showing that plaintiff  
11 himself heard either Achenbach or Robertson use the word "nigger,"  
12 meaning there is no evidence that the epithet was ever directed at  
13 plaintiff in his presence within the actionable time period.  
14 Plaintiff did not witness the incidents his co-workers told him  
15 about. Thus, even assuming that Achenbach and Robertson made the  
16 comments attributed to them by plaintiff's co-workers, they did so  
17 outside of plaintiff's presence. This, defendant argues, fails to  
18 show that Achenbach and Robertson intended to cause plaintiff  
19 severe emotional distress.

20 I agree. Intent is defined to mean "where the actor desires  
21 to inflict severe emotional distress, and also where he knows that  
22 such distress is certain, or substantially certain, to result from  
23 his conduct." McGanty, 321 Or. at 550, 901 P.2d at 853 (internal  
24 quotation and emphasis omitted). I do not question the offensive,  
25 inflammatory, and demeaning nature of the term "nigger." Nor will  
26 I quibble here over whether anger, anxiety, fear, depression, or  
27 any particular variety of emotional distress is or is not the sort  
28 to support this element of the tort. However, the defendant must

1 intend to cause the plaintiff emotional distress, and that the  
2 distress be severe.

3       Comments made outside of plaintiff's presence fail to show  
4 that Achenbach or Robertson intended to cause plaintiff emotional  
5 distress or that they were certain or substantially certain that  
6 such use of the term would cause plaintiff severe emotional  
7 distress. In other cases analyzing an Oregon IIED claim where the  
8 use of racial or sexual slurs has occurred, the comments have been  
9 directed at the victim in his or her presence, and there has been  
10 other offensive conduct as well. E.g., Whelan v. Albertson's,  
11 Inc., 129 Or. App. 501, 504-06, 879 P.2d 888, 891 (1994)  
12 (plaintiff's supervisor and co-worker repeatedly referred to  
13 plaintiff as "queer" and imitated his allegedly effeminate  
14 characteristics in front of plaintiff and other employees,  
15 plaintiff's supervisor asked plaintiff if he had "fucked" a woman  
16 he dated, the plaintiff's co-worker called plaintiff a "fucking  
17 queer asshole," and the co-worker shoved the plaintiff hard in the  
18 chest, among other things); Lathrope-Olson v. Department of  
19 Transp., 128 Or. App. 405, 408, 876 P.2d 345, 347 (1994) (when  
20 defendant's overtly racist and sexual comments were directed to  
21 plaintiff and defendant engaged in other acts of psychological and  
22 physical intimidation, summary judgment to employer was improper);  
23 Franklin v. Portland Comm. College, 100 Or. App. 465, 467, 469-72,  
24 787 P.2d 489, 490, 491-83 (1990) (supervisor's use of racial  
25 epithet "boy," directed to African-American employee, along with  
26 issuing false reprimands, attempting to lock him in an office, and  
27 suggesting that he apply for a different job with another employer,  
28 were enough to show continual verbal and physical harassment such

1 that, if proven, the plaintiff could show that the supervisor had  
2 the specific intent to cause the plaintiff severe emotional  
3 distress). Without more, racially charged comments about  
4 plaintiff, not made in his presence, fail to create an issue of  
5 fact on the intent element of the IIED claim.

6 As to the other allegation regarding Achenbach's and  
7 Robertson's desire to "get rid" of plaintiff, defendant initially  
8 challenges the admissibility of the evidence supporting this  
9 allegation, and then argues that even considering it, it does not  
10 support plaintiff's claim. I address the evidentiary objection in  
11 a separate section of this Opinion. However, even considering the  
12 evidence, I agree with defendant.

13 There are two pieces of evidence plaintiff relies on to  
14 support his contention that Achenbach and Robertson wanted to get  
15 rid of him because he is African-American. First is an October 6,  
16 2009 letter written by Robertson after his termination in which he  
17 writes "To Whom it May Concern," and takes issue with Achenbach's  
18 role as a supervisor. Pltf Exh. 9 at pp. 6-7. He states that  
19 Achenbach "abused his position in the [company] against co-workers  
20 under his supervision. Id. Robertson states that he could recall  
21 "one specific incident, when [Achenbach] asked me to provoke other  
22 co-workers of a specific race into losing their jobs." Id.

23 The other piece of evidence is a statement by African-American  
24 employee Ratcliff during Stevens's investigation into a race  
25 discrimination complaint by Campbell against Achenbach. Ratcliff  
26 told Stevens that Ratcliff had "NEVER heard [Achenbach] say  
27 anything discriminatory 1st hand, but . . . Joe Robertson told  
28 [Ratcliff] that [Achenbach] said that he wanted to get rid of



1 [plaintiff] first, [Campbell] second, and [Ratcliff] third.  
2 [Ratcliff] was not sure that this was true, but if it was, it would  
3 be suspicious since they were all three black." Pltf Exh. 9 at p.  
4 11.

5 I note that first, neither piece of evidence implicates  
6 Robertson as desiring to get rid of plaintiff, for any reason. Any  
7 ill motive is alleged to have been held by Achenbach only. Second,  
8 again, the evidence is that Achenbach shared certain feelings with  
9 Robertson about a desire to get rid of certain employees. Neither  
10 statement attributed to Achenbach includes any overt racial  
11 reference or slur, and, even if one can be inferred, the statements  
12 were not made directly to plaintiff. Without more, the evidence is  
13 not capable of allowing a reasonable factfinder to conclude that  
14 Achenbach intended to cause plaintiff severe emotional distress or  
15 was certain, or substantially certain, such distress would occur  
16 because of Achenbach's conduct. Assuming Achenbach wanted  
17 plaintiff gone from the work place is not the same as inferring  
18 that he intended to cause plaintiff severe emotional distress.

19 I grant summary judgment to defendant on the IIED claim.

### 20 III. Evidentiary Objections

21 Defendant objects to the admission of Robertson's October 6,  
22 2009 letter, and Ratcliff's statements to Stevens during her  
23 investigation of Campbell's race harassment complaint.

24 I did not consider the evidence in regard to the section 1981  
25 claim, and even considering it as part of the IIED claim, I grant  
26 defendant's motion. Thus, it is unnecessary to resolve the  
27 evidentiary objections.

28 However, I note that with both exhibits, plaintiff ultimately

1 relies on Federal Rule of Evidence 801(d)(2)(D) to argue that the  
2 statements attributed to Achenbach by Robertson in his letter, or  
3 by Ratcliff in his statements to Stevens, are admissible as  
4 statements of a party's agent concerning a matter within the scope  
5 of the agency or employment, made during the existence of the  
6 employment relationship.

7 The proponent of allegedly non-hearsay evidence consisting of  
8 a statement by a party's agent, has the burden to demonstrate the  
9 foundational requirement that the statement related to a matter  
10 within the scope of the witness's agency or employment. United  
11 States v. Chang, 207 F.3d 1169, 1176 (9th Cir. 2000). Facts  
12 regarding the agent's duties are clearly relevant to the analysis.  
13 See, e.g., Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1045-46  
14 (9th Cir. 1999) (analyzing facts regarding scope of agency); City  
15 of Long Beach v. Standard Oil Co. of Calif., 46 F.3d 929, 937 (9th  
16 Cir. 1995) (affirming exclusion of agent's statements because of  
17 proponent's failure to include in the record any evidence regarding  
18 agent's role in company).

19 Here, plaintiff fails to create a record supporting the  
20 admission of Achenbach's statements under Rule 801(D)(2)(d). There  
21 is no evidence regarding Achenbach's job description, his actual  
22 duties, or his authority to fire employees. Without such  
23 information, the record does not show that the statements  
24 attributed to him concerned a matter within the scope of his  
25 agency.

#### 26 CONCLUSION

27 Defendant's summary judgment motion [20] is granted as to the  
28 disparate treatment section 1981 claim, is denied as to the other

1 bases of the section 1981 claim, and is granted as to the IIED  
2 claim.

3 IT IS SO ORDERED.

4 Dated this 8th day of March, 2011

5  
6  
7 /s/ Dennis James Hubel  
8 Dennis James Hubel  
9 United States Magistrate Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28